

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 30, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0705

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

BRIAN E. DAVIS,

PLAINTIFF-APPELLANT,

V.

**NATIONSBANK, N.A., N/K/A BANK OF AMERICA,
NATIONSBANC MORTGAGE CORP., N/K/A
BANK OF AMERICA MORTGAGE, AND
BANKERS TRUST COMPANY OF CALIFORNIA,
N.A., AS TRUSTEE FOR VENDEE MORTGAGE
TRUSTS(S) 1993-2, 1994-1 AND 1995-1,
AS FOREIGN CORPORATIONS,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee
County: FRANCIS T. WASIELEWSKI, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Brian E. Davis appeals *pro se* from a grant of summary judgment in favor of Nationsbank, N.A., et al. Davis claims: (1) the trial court erred when it refused to grant default judgment in his favor after Nationsbank filed an untimely answer; (2) that the answer should have been struck; (3) the trial court erred in awarding damages to Nationsbank for defending against a default judgment sought against Bankers Trust Company; (4) Nationsbank and Bankers Trust Company have an agency relationship; (5) Nationsbank violated WIS. STAT. § 223.12 (1997-98);¹ (6) Nationsbank violated WIS. STAT. § 943.30(1) by threatening and intimidating Davis; and (7) summary judgment should not have been granted. Because we resolve each of these claims in favor of upholding the judgment, we affirm.

I. BACKGROUND

¶2 In June 1998, Davis filed a summons and complaint against Nationsbank Mortgage Corp. and Nationsbank, alleging that his mortgage-holder failed to timely mail him escrow checks for payment of property taxes on several properties he owned. He attempted to plead causes of action for breach of fiduciary duty, fraud, and a violation of WIS. STAT. § 138.052(7s). Nationsbank was served with the summons and complaint on June 17, 1998.

¶3 On August 12, 1998, Nationsbank filed a motion to dismiss the complaint based on failure to state a claim. Davis filed a motion seeking default judgment for failure to file a timely answer. Nationsbank then filed a motion requesting an enlargement of time to file an answer, and argued that default

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

judgment should not be granted because the failure to timely file an answer was the result of excusable neglect. At the hearing, the trial court found that Nationsbank's explanation for failure to timely file an answer constituted excusable neglect. As a result, the trial court denied Davis's motion seeking default judgment, and granted the motion to enlarge the time to file an answer. The trial court also granted Nationsbank's motion seeking to dismiss the complaint, but allowed Davis the opportunity to replead his cause of action for breach of fiduciary duty.

¶4 Davis filed an amended complaint. Nationsbank filed its answer. Davis filed a motion seeking to strike the answer. The trial court denied the motion after a hearing and again gave Davis an opportunity to file an amended complaint. Davis filed another amended complaint alleging four causes of action. Nationsbank filed a motion seeking summary judgment. At the hearing, the trial court agreed with Davis that a question of fact may exist on the breach of fiduciary duty claim, but granted summary judgment on the other three causes of action. The trial court instructed Davis that the remaining claim, as pled, was insufficient, and gave Davis another opportunity to "clean-up" the allegations.

¶5 Davis filed another amended complaint, adding Bankers Trust Company of California, N.A. as a party. Davis had recently learned that Bankers Trust was the owner of his mortgages. Davis also alleged that Nationsbank had conspired to violate 42 U.S.C.A. § 1985(3) and WIS. STAT. §§ 943.30(1) and 223.12(4). These new claims were based on a letter sent to Davis's home offering him free accidental death insurance through Nationsbank, and on questions during Davis's deposition about his wife. Davis felt threatened by these events.

¶6 Bankers Trust did not respond to the amended complaint and Davis moved the trial court to grant default judgment against Bankers Trust. Nationsbank opposed the motion, arguing that Davis had failed to properly serve Bankers Trust and Bankers Trust was never named in a *summons*. The trial court agreed, denied Davis's motion seeking default, and granted Nationsbank's motion seeking frivolous costs in defending this matter. Nationsbank also filed a motion seeking to dismiss Davis's new claims alleging violations of the federal code and the Wisconsin statutes. The trial court granted these motions, leaving only Davis's breach of fiduciary duty claim.

¶7 In December 1999, Nationsbank filed a motion seeking summary judgment on Davis's last remaining claim. After a hearing, the trial court granted the motion and dismissed the case. Judgment was entered accordingly. Davis now appeals.

II. DISCUSSION

A. *Excusable Neglect*.

¶8 Davis argues that the trial court erroneously exercised its discretion when it found that Nationsbank's explanation for the untimely filed answer constituted excusable neglect. We disagree.

¶9 Under WIS. STAT. § 801.15(2)(a) a trial court's decision to grant a motion to extend the time to answer is highly discretionary. *Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 467, 326 N.W.2d 727 (1982). Our review is limited to whether the trial court examined the relevant facts, applied a proper legal standard, and reached a reasonable conclusion. *Doerschling v. Funeral Directors*, 138 Wis. 2d 312, 328, 405 N.W.2d 781 (Ct. App. 1987).

¶10 WISCONSIN STAT. § 801.15(2)(a) provides that a trial court may extend the time in which an act is required if the court finds that the failure to act in a timely manner was the result of excusable neglect. Excusable neglect is defined as “that neglect which might have been the act of a reasonably prudent person under the same circumstances.” *Giese v. Giese*, 43 Wis. 2d 456, 461, 168 N.W.2d 832 (1969) (citation omitted). It is “not synonymous with neglect, carelessness or inattentiveness.” *Id.*

¶11 Here, Nationsbank offered the testimony of Project Analyst Nickie L. Heady, who stated that she was on vacation when the summons and complaint were placed on her desk, and did not discover the documents until June 29, 1998. She averred that the documents did not contain a date of service, and she assumed that they were served on the day she discovered them. She also testified that this customary practice of handling complaints has never failed in the past. The trial court accepted this explanation in finding that the conduct was excusable neglect. The trial court also indicated that it could not enter default judgment in favor of Davis because he had failed to plead a legally cognizable claim. We cannot conclude that the trial court’s decision was erroneous, particularly because Davis has failed to include in the record the transcript of the hearing relative to this issue. Accordingly, we are obligated to assume that every fact necessary to sustain the trial court’s decision is contained in the record. *See Duhamel v. Duhamel*, 154 Wis. 2d 258, 269, 453 N.W.2d 149 (Ct. App. 1989).

B. Failure to Strike Answer.

¶12 Davis next contends that the trial court erred when it refused to strike Nationsbank’s answer. We do not agree.

¶13 Although the demurrer has been abolished as an instrument of Wisconsin civil procedure, WIS. STAT. § 802.01(3) motions to strike an answer and dismiss a claim, serve the function of the common law general demurrer. 3 W. HARVEY, RULES OF CIVIL PROCEDURE § 2101 at 164 (West's Wis. Prac. Series 1975); *Lumbermens Mut. Cas. Co. v. Royal Indem. Co.*, 10 Wis. 2d 380, 382-83, 103 N.W.2d 69 (1960). Such motions admit the truth of all properly pleaded material facts and all reasonable inferences deriving from them, although legal conclusions and unreasonable inferences need not be accepted. *Sipple v. Zimmerman*, 39 Wis. 2d 481, 489, 159 N.W.2d 706 (1968). The motions must fail if the facts alleged would constitute a defense (in the case of a motion to strike) under any theory of law recognized in Wisconsin. See *Keller v. Welles Dept. Store of Racine*, 88 Wis. 2d 24, 28-29, 276 N.W.2d 319 (Ct. App. 1979).

¶14 The pleading challenged by a motion to strike should be liberally construed with a view to achieving substantial justice. *Halker v. Halker*, 92 Wis. 2d 645, 650, 285 N.W.2d 745 (1979). Accordingly, a defense should not be struck unless the facts alleged in the answer could form no basis for any theory of defense under Wisconsin law. *Id.*

¶15 At the trial court hearing on this motion, Davis argued that he wanted Nationsbank's answer struck because it admitted that he had a valid claim. Striking an answer on that basis is improper procedurally, and inconsistent with the facts presented in the answer. Davis, however, presents a different argument in his appeal on this issue. He argues that the answer should have been struck because it contains lies and misrepresentations. Davis fails to cite any legal authority to support this proposition. We could reject his claim on this basis alone. See *State v. Shaffer*, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980).

¶16 We conclude that the trial court did not err when it denied Davis's motion to strike. Davis's attack focuses on his belief that Nationsbank was lying with respect to the corporate status, structure and relationship among the various entities involved with Davis's mortgages. Even if we were to assume Nationsbank acted improperly in this respect, a liberal construction of the answer requires us to reject Davis's request. The answer contains sufficient facts which, if true, present a valid defense under Wisconsin law.

C. Bankers Trust.

¶17 Davis next argues that the trial court erred when it awarded damages to Nationsbank for defending against the default judgment motion filed against Bankers Trust. We disagree.

¶18 A claim is frivolous when a party or attorney "knew or should have known" that the claim lacked "any reasonable basis in law or equity." WIS. STAT. § 814.025(3)(b). A court uses an objective standard to determine whether an action is frivolous. "The standard is 'whether the attorney knew or should have known that the position taken was frivolous as determined by what a *reasonable attorney* would have known or should have known under the same or similar circumstances.'" *Stern v. Thompson & Coates, Ltd.*, 185 Wis. 2d 220, 241, 517 N.W.2d 658 (1994) (citation omitted).

¶19 Inquiries about frivolousness involve a mixed question of law and fact. *Id.* The determination of what a party or attorney "knew or should have been known" is a factual question, and the trial court's findings of fact will not be reversed by an appellate court unless the findings of fact are clearly erroneous. *See* WIS. STAT. § 805.17(2). The ultimate conclusion of whether the trial court's factual determinations support the legal determination of frivolousness is,

however, a question of law, which we decide independent of the trial court. *Stern*, 185 Wis. 2d at 241.

¶20 Here, despite repeated suggestions by the trial court to contact an attorney, Davis continued to proceed *pro se*. As a result, he is held to the same standard as an attorney in regard to knowledge of frivolous matters. Here, Davis failed to identify Bankers Trust as a party in any summons, and failed to properly serve the entity with a complaint. Without taking either action, Davis moved the court to enter default against Bankers Trust for its failure to answer. Clearly, Bankers Trust, which never received a complaint or was named in a summons, could not know that it was required to file an answer.

¶21 The procedural rules relative to commencement of an action in Wisconsin are clearly set forth in our statutes. Davis either knew, or should have known, that Bankers Trust could not be made a proper party to this action without being named in a summons and properly served with the complaint. Davis's belief that some agency relationship existed between Nationsbank and Bankers Trust does not relieve him of his responsibility to properly name and serve an additional party to the lawsuit. Under these circumstances, it was reasonable for the trial court to find that Davis's motion seeking default judgment against a party that had never been served was frivolous. The fact that Nationsbank had to respond, attend, and participate in the frivolous proceedings entitled it to the costs associated with the matter.

D. Agency Relationship.

¶22 Davis argues that Nationsbank operated under the direction of Bankers Trust, that Bankers Trust delegated duties to its agent, Nationsbank, that principal-agency relationship between the entities is clear, and that the trial court

ignored it. We discern that this argument constitutes a different way to suggest that the trial court should not have dismissed his claims against Bankers Trust because it is responsible for the acts of the alleged agent, Nationsbank.

¶23 Even if Davis is correct and Nationsbank is Bankers Trust's agent, Bankers Trust must still be properly served to become a party to the action. *See Punke v. Brody*, 17 Wis. 2d 9, 14-15, 115 N.W.2d 601 (1962). An agent may accept service on behalf of a principal only if the principal authorizes the agent to accept the service for the principal. *See id.* In the instant case, there is nothing in the record demonstrating that Bankers Trust authorized Nationsbank to accept service of Davis's complaint on its behalf.

E. WISCONSIN STAT. § 223.12.

¶24 Next, Davis contends that his claim should not have been dismissed because Nationsbank failed to comply with WIS. STAT. § 223.12(4), which requires a certificate of authority for all foreign corporations acting as a trustee in Wisconsin. We reject Davis's contention.

¶25 Statutory construction presents a question of law, which we review independently. *West Bend Mut. Ins. Co. v. Berger*, 192 Wis. 2d 743, 750, 531 N.W.2d 636 (Ct. App. 1995). Our construction of the statutes at issue here results in our conclusion that the trial court did not err when it dismissed the claim. The statute that Davis relies on does not create a private right of action. Rather, enforcement of this section rests with the banking commissioner. *See* WIS. STAT. § 223.105(5) ("The division of banking ... shall upon the failure of such organization to submit notifications or reports required under this section ... upon due notice, order such defaulting organization to cease and desist from engaging in

fiduciary activities and may apply to the appropriate court for enforcement of such order.”).

F. WISCONSIN STAT. § 943.30(1).

¶26 Davis also argues that Nationsbank threatened and intimidated him in violation of WIS. STAT. § 943.30(1). Specifically, he argues that a letter he received during this litigation, which offered him free accidental death coverage insurance, constituted a threat on his life. Davis said he wrote to counsel for Nationsbank and asked that Nationsbank refrain from sending him such threatening letters. Three weeks later, he received another letter from Nationsbank again offering the free accidental death insurance. Davis also points to information requested during his deposition asking his home address and personal questions about his wife. We are not convinced that the trial court erred when it dismissed this claim.

¶27 WISCONSIN STAT. § 943.30(1) provides:

Whoever, either verbally or by any written or printed communication, maliciously threatens to accuse or accuses another of any crime or offense, or threatens or commits any injury to the person, property, business, profession, calling or trade, or the profits and income of any business, profession, calling or trade of another, with intent thereby to extort money or any other pecuniary advantage whatever, or with intent to compel the person so threatened to do any act against the person’s will or omit to do any lawful act, is guilty of a Class D felony.

¶28 Construction of a statute is a question of law. *West Bend Mut. Ins. Co.*, 192 Wis. 2d at 749. The trial court dismissed Davis’s cause of action based on this statute because it was not properly pled. Davis failed to plead any of the elements sufficient to state a cause of action. Moreover, this statute states a

criminal code violation, more appropriately left to enforcement in the criminal courts.

G. Summary Judgment Claim.

¶29 Finally, Davis claims that the trial court should not have granted summary judgment on his breach of fiduciary duty claim. He argues that an issue of fact existed and the law supported his claim. We disagree.

¶30 In reviewing a grant of summary judgment, we employ the same methodology as the trial court. *See Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). We first examine the pleadings and affidavits to determine whether a claim for relief has been stated. *See id.* If a claim for relief has been stated, we then determine whether any factual issues exist. *See id.* If there is no genuine issue as to any material fact, and if the moving party is entitled to judgment as a matter of law, we will affirm the trial court's decision granting summary judgment. *See id.* Our review is *de novo*. *See id.*

¶31 Davis alleges that Nationsbank breached its fiduciary duty to him by failing to mail his escrow payments before December 31, 1997. The breach of fiduciary duty cause of action as pled in his complaint states:

9. For a second time, even though plaintiff notified defendants in accordance with their very own notice that he wanted his tax payments sent to him by December 20, 1997, defendants withheld plaintiff's tax escrow funds until the last day of 1997 (December 31) thereby denying him the write-off for 1997 (See plaintiff's affidavit dated April 23, 1999 with attached 1997 sched. E tax forms). Defendants took this action even though they believed this was an intentional and willful violation of Wisconsin law as shown in their letters to plaintiff dated August 8, 1997 (See exhibit B).

10. Plaintiff alleges that this fraudulent and deceitful pattern of behavior established by Boatmen's Mortgage and continued by defendants for the purpose of withholding many or all of their mortgagors' funds amounting to millions of dollars for the purpose of collecting interest on same even though they believe this practice violates the law in Wisconsin and possibly other states.

11. These escrow funds are held in trust by defendants for the payment of taxes in compliance with the mortgage agreements and Wisconsin law and their failure to comply and cover-up is a tortious breach of their fiduciary duty to plaintiff.

The trial court found that this language, which is essentially the same language pled in Davis's original complaint, was insufficient to state a cause of action for breach of fiduciary duty. The trial court afforded Davis repeated attempts to revise the complaint. Although it is not entirely clear from the record because Davis failed to provide us with a transcript from the summary judgment hearing, it appears that the trial court did not base its decision to dismiss Davis's breach of fiduciary duty claim on his insufficient pleading. Rather, the trial court granted Nationsbank summary judgment because the case law interpreting the language Davis was relying on holds that no fiduciary duty is created.

¶32 The language that Davis relies on in asserting that a fiduciary duty was created is found in the mortgage document, which states in pertinent part: the Mortgagor "will pay to the Mortgagee, as trustee (under the terms of this trust as hereinafter stated) together with, and in addition to, the payments on the note secured hereby." Davis argues that the "trust-trustee" language demonstrates the existence of a fiduciary duty. The law, however, suggests otherwise.

¶33 The use of the term "in trust" or other words referring to a trust relationship in a contract, is not determinative of the existence of a trust. *See Judd v. First Fed. Savings & Loan Ass'n*, 710 F.2d 1237, 1241 (7th Cir. 1983).

Rather, the “principle consideration is intent” of the parties to the contract. *Id.* The document at issue here is a form document used by the Veterans Administration. The “trust” language in the VA-approved mortgage form has been interpreted to create a debtor-creditor relationship rather than a fiduciary one. *See id.*; *Kronisch v. Howard Sav. Inst.*, 392 A.2d 178, 179 (N.J. Super. Ct. App. Div. 1978) (contention that “in trust” language in mortgage created fiduciary relationship was “too literal a reading of the ... language, isolating it from the remaining provisions of the instrument.”).

¶34 We conclude that the VA form here, likewise, creates a debtor-creditor relationship. The isolated “trust” language scattered throughout two paragraphs does not transform the relationship into a fiduciary one. Rather, an examination of the whole document confirms that the instrument was not intended to create a fiduciary relationship. Like the form document in *Judd*, the document here, when examined as a whole, shows that the document intended to create a debt.

Several factors indicate establishment of a debt rather than creation of a trust. If the monthly payments here are insufficient to cover first the sums due for taxes and insurance, and second the monthly loan debt, then the mortgagors are in default. There are no expressed restrictions on the mortgagee’s use of the monthly payments until the liability arises to pay insurance and taxes. Additionally, none of the parties ever manifested an intention to create a trust other than by signing a form document.

Id., 710 F.2d at 1241. Accordingly, the trial court did not err when it granted summary judgment in favor of Nationsbank.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

